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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

OSCAR DELALUZ,

Defendant and Appellant.

B285408

(Los Angeles County
Super. Ct. No. PA084082)

APPEAL from a judgment of the Superior Court of Los Angeles County, Hayden Zacky, Judge. Affirmed in part, and reversed in part, with directions.

Mark Yanis, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell and Douglas L. Wilson, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Oscar Delaluz was convicted by jury of two counts of first degree murder (Pen. Code, § 187, subd. (a) [counts 1 & 2])¹ for the murders of Mario Muro and Spencer H., and the jury found true one multiple-murder special circumstance, and allegations that defendant personally discharged a firearm causing death for each count (§§ 190.2, subd. (a)(3), 12022.53, subds. (b), (c), (d)). Defendant admitted a prior conviction allegation (§§ 667, subds. (a)(1), (d), 1170.12, subd. (b)). He was sentenced to two consecutive life terms, without the possibility of parole for each count, two terms of 25 years to life for the firearm enhancements, and five years for his prior conviction.

Defendant appeals, arguing the prosecutor committed prejudicial misconduct by arguing facts not in evidence and denigrating defense counsel; the cumulative impact of these errors denied him a fair trial; the case must be remanded for the trial court to exercise its discretion to strike the firearm and prior conviction enhancements; and the trial court erred in imposing two multiple-murder special circumstance findings. We agree that remand is appropriate for the court to exercise its discretion regarding the enhancements, and that one special circumstance finding must be set aside, but otherwise affirm the judgment.

FACTUAL BACKGROUND

The Shooting

At approximately 2:00 a.m. on July 26, 2015, Mr. Muro visited his friend, Jose R., at an apartment complex on Pierce Street in Pacoima, where Jose lived. When Mr. Muro arrived, he

¹ All undesignated statutory references are to the Penal Code, unless otherwise indicated.

yelled up to Jose's second floor apartment from the complex's parking lot. Jose went down to greet Mr. Muro, and noticed several other people there. The parking lot was a frequent hang out for people to drink alcohol and smoke "pipe[s]." The two men went upstairs and socialized on Jose's porch for a time, after which Mr. Muro called a taxi and left. Jose went to bed, but was startled awake by approximately six gunshots. He walked out of his apartment and saw Spencer laying on the ground. After police arrived, Jose noticed Mr. Muro laying some distance away on the sidewalk.

Arisha H. also lived in the complex on Pierce Street. Her mother was the complex's manager. Arisha arrived home from work at approximately 2:00 a.m. on July 26. When she parked her car, she saw several men hanging out in the complex's parking lot, including Juan C. "Big Boy," Martin M. "Sapo," Leonardo U. "Bocho," Charlie C., Jose and Mr. Muro. Soon after Arisha entered her apartment, her brother Spencer came from the apartment he shared with their mother, and asked to borrow Arisha's car. He told her he first intended to sweep the complex before leaving.

Sometime after 5:00 a.m., Arisha heard Spencer dragging a trashcan out so he could sweep. She then heard several gunshots. Arisha ran to the door and heard more gunshots. Once the shooting stopped, she went outside and saw Spencer running towards the complex's courtyard, and then collapse. She ran outside to check if she could see anyone fleeing, and saw Mr. Muro laying near a phone box. Neither Spencer nor Mr. Muro could speak; they just gurgled when she asked who had shot them. Arisha called 911 at 5:45 a.m.

J. Rodriguez lived near the Pierce Street apartment complex. At approximately 5:20 a.m. on July 26, Mr. Rodriguez walked from his home to the Valero gas station across the street from the Pierce Street complex to buy cigarettes. The gas station was closed, and did not open until 6:00 a.m. Mr. Rodriguez noticed Mr. Muro standing across the street, near the apartment complex. He did not know Mr. Muro, but decided to talk to him to pass the time. Mr. Muro told Mr. Rodriguez he was waiting for a taxi.

As Mr. Muro and Mr. Rodriguez were standing on the corner near the complex, defendant approached them, riding a bicycle. Mr. Muro and defendant began arguing about drugs and money, so Mr. Rodriguez walked across the street to the gas station, fearful that something might happen. Mr. Rodriguez recognized defendant; he had seen him riding a bicycle by his house several times before.

From across the street at the gas station, Mr. Rodriguez saw that defendant and Mr. Muro were still talking. Eventually, Mr. Muro walked inside the apartment building, and defendant rode his bicycle past Mr. Rodriguez, making eye contact with him. Defendant eventually made his way back to the complex's parking lot.

A short time later, Mr. Rodriguez saw Mr. Muro running from the complex's parking lot. Defendant followed him and fired a gun. Mr. Rodriguez saw Mr. Muro fall to the ground, and defendant fled the scene on foot.

Both men died from multiple gunshot wounds. Toxicology reports showed that both Mr. Muro and Spencer had used methamphetamine at some point prior to their deaths.

Police Receive a Tip

Martha N. and Juan C. were involved in a romantic relationship, and spent time together near the Pierce Street apartment complex, smoking methamphetamine. She had also smoked methamphetamine at the complex with Mr. Muro on several occasions. Martha also had a sexual relationship with defendant, who spent time at the apartment complex. Defendant told her he was from the Alley Locos gang, and used the moniker “Downer.” Martha purchased methamphetamine from defendant, and also sometimes bought it from Martin. Martha was a member of the Colonia Chiquez gang.

Juan called Martha in the early morning hours after the shooting, and sounded upset. They met at a restaurant to talk, and Juan told her that defendant had shot Mr. Muro and Spencer. Worried about retaliation, Martha told Juan to “shut the f--k up and not say anything” about the killings.

Martha told police about the shooting after she was picked up for failing to report to her parole officer.² She initially gave a

² Juan was arrested a day after Martha made her statement about the shooting to police, and was interviewed by Detective Manuel Armijo. He claimed he did not know defendant, and that he was not present during the shooting but was nearby and heard the gunshots. At trial, he admitted he knew defendant, that he and Martin had smoked methamphetamine together at the Pierce Street apartments before the shooting, and that he saw Spencer, Mr. Muro and Jose the morning of the shooting. He claimed he was not present at the time of the shooting, but learned about it when he returned to the complex with Leonardo (whom Arisha had seen hanging out with the group at the complex when she got home that morning). He denied speaking with or meeting with Martha and telling her he saw defendant shoot the victims.

different name for Juan because she was scared he could be killed for discussing the murders.

Martha had hoped that she would receive leniency in a criminal case which was filed against her several months before her testimony at trial, given her status as a witness in this case. However, the district attorney refused to give her any leniency.

The Investigation

Detective Armijo responded to the scene of the shooting. He interviewed approximately 45 people in connection with the shooting. Most of the people interviewed responded that “they didn’t hear anything or see anything.” The witnesses were “uncooperative” and did not want to talk to police. When he went to serve subpoenas upon residents of the Pierce Street apartments, people would “disappear[.]”

Detective Armijo assembled a six-pack photo lineup, and showed it to Mr. Rodriguez on August 5. Mr. Rodriguez identified defendant as the shooter.

Defendant’s Arrest and Police Search

Defendant was arrested on August 9, 2015. That same day, Detective Armijo conducted the search of the apartment where defendant lived with his mother. During that search, he found a small black BMX style bicycle, and a yellow notepad. Mr. Rodriguez identified the bicycle as the one defendant used on the night of the shooting.

The notepad contained a “pay and owe sheet,” commonly used by drug dealers to keep track of money paid and owed by individuals for drug transactions. The quantities and prices listed were consistent with methamphetamine sales.

Before his arrest, defendant warned his mother the police were looking for him because he was accused of killing someone.

Defense Evidence

Leonardo lived at the Pierce Street apartment complex. On the morning of the shooting, he borrowed a black bicycle from his uncle, who lived nearby. He rode it to the apartment complex and confronted Mr. Muro, who was standing outside, because he did not recognize him. Mr. Muro told Leonardo he was waiting for a taxi. Leonardo left the bicycle outside and entered his apartment. When he came out 30 minutes later, he saw a man taking the bike. He gave chase and was not able to catch him. Leonardo returned to his uncle's house, obtained another bike, and rode back to the complex. When he arrived, police were there and the complex was cordoned off. He gave the bike to a man named "Dino."³

N.R. is the nephew of victim Spencer H. He was 14 years old at the time of trial. He was present at jury selection for the trial, and asked to speak with the district attorney and the detective. He told them Leonardo had told him that he "killed someone but no one knows that he did it."

N.R. testified that as he was returning to the Pierce Street complex from skating, he encountered Leonardo and some friends drinking in the courtyard. Leonardo told N.R. that "he sent [his] uncle to heaven." N.R. began "cussing" at him, and Leonardo and his friends laughed. N.R. retrieved a bike from his apartment and went to ride with a friend. When he returned to the complex, Leonardo told him, "Did you know I killed someone but no one knows?" Leonardo also told N.R. that he wanted to be with his mother sexually.

³ Defendant testified that he knew Juan to also go by the nickname "Dino."

N.R. did not tell anyone about the comments because he “forgot because [he] was mad.” After the trial commenced, he told the district attorney and Detective Armijo because he felt that Leonardo had something to do with Spencer’s death.

Olivia G. spent time with defendant the weekend of the shooting. That summer, she and defendant spent a lot of time together, generally seeing each other every day. Defendant sold methamphetamine, and because he did not have a car, Olivia often drove him around to help him sell drugs. Olivia, defendant, and Martin would use methamphetamine, and hang out together at the Pierce Street apartments.

On the evening of July 25, 2015, Olivia, defendant, and their mutual friend Bridgett M. attended a baptism party at defendant’s mother’s apartment complex on Van Nuys Boulevard. They stayed at the party until midnight. They then drove in Olivia’s truck to a casino located near Woodman Avenue and Chase Street to gamble. They saw Martin and his girlfriend at the casino. Olivia, defendant, and Bridgett stayed there until 4:00 a.m. The group then went to Fernanda’s house near Woodman Avenue and Lassen Street.

Olivia left at approximately 6:00 a.m. to pick up her child. Defendant and Bridgett stayed behind at Fernanda’s house. Olivia lived near the Pierce Street apartment complex, and had trouble driving home because Pierce Street was blocked off by police. Later that day, she learned about the shooting on Facebook.

Following defendant’s arrest, Detective Armijo contacted Olivia. He told her defendant said he was with her at the time of the shooting. Detective Armijo did not tell Olivia on what date the shooting occurred, but asked her to tell him what happened

“that day.” Olivia told Detective Armijo she, defendant, and defendant’s girlfriend “Chela” had gone to Michael M.’s house in Panorama City.

Olivia was subsequently interviewed by Detective Armijo at the police station. She brought Michael with her to be interviewed as well. She and Michael were interviewed separately. After their respective interviews, Michael told Olivia he was in custody in San Bernardino on the morning of the murders, and could not have been with her and defendant. She initially thought he had lied to police about being in custody because he was nervous.

Olivia later realized that she had told the detective about the wrong day, after she spoke with defendant’s mother who reminded her about the baptism the day before the shooting. She never told Detective Armijo about the baptism or what she and defendant had actually done on the day of the shooting because he had “threatened [her] saying he was going to try to get [her] for accomplice or something like that” if she was lying. She was worried he would think she was not telling the truth.

Olivia testified that she spoke with defendant for the first time after the shootings when she visited him in jail about a month after his arrest. However, she was impeached with evidence of a recorded jail call between her and defendant, where she asked if he needed an alibi after defendant told her he had been arrested for a double murder. The phone call occurred before Olivia spoke with Detective Armijo.

In the recorded phone call, after Olivia asked if defendant needed an alibi, she told him, “Don’t you remember fool. . . . Don’t you remember that day you and I were together. . . .” Defendant said, “I remember that you dropped me off at

Fernanda's house, didn't you?" Olivia then went on to explain: "[O]kay[,] so this is what happened: we were, remember you were at um. . . . You were eating with, Chela? [¶] You were eating with Chela in McDonald's around 3:00 or 4:00 o'clock in the morning. [¶] And I called you because I didn't have my phone. [¶] I know exactly what phone number I called you from, and then I told you: 'Okay, I'm gonna meet up with you guys.' And then that's when we all went [unintelligible], and then from [unintelligible] I told you I had to leave, because I had to go, uhm, home 'cause remember I have a curfew." Defendant responded, "Yeah" and urged Olivia to talk to Detective Armijo "because that's the only thing that's gonna help me out."

Olivia testified she had asked if defendant needed an alibi because she and defendant spent every day together, so she assumed she was with him at the time of the murders.

Ana V. hosted the party for her son's baptism and confirmed that defendant showed up the day before the shooting, but she did not know what time defendant left the party.

Defendant testified he was a member of the Alley Locos gang, and that he had been convicted of robbery in 2008. Defendant and Martin had grown up together and were good friends. Defendant often visited Martin at the Pierce Street apartment complex. They sometimes smoked methamphetamine in the complex's parking lot. However, near the time of the shooting, defendant did not see Martin as frequently because Martin was in a new relationship, and was staying with his girlfriend in Palmdale. Therefore, defendant "didn't have no reasons to go to those apartments."

Defendant knew Martha. They had sex once, and he sold her methamphetamine once or twice. They sometimes would hang out and smoke methamphetamine together.

During the summer of 2015, defendant was selling drugs “part time” to support his drug habit. He would smoke a “teener” of methamphetamine daily, which was “half an eight ball.” He never sold methamphetamine at the Pierce Street apartments. Defendant did not keep a list of the people he sold drugs to. He did keep a list of people to whom he lent money, or sold tools, or roofing materials.

At the time of the shooting, defendant was at his friend Fernanda’s house. He had met her at the casino, and she allowed him to stay at her house when he needed a place to stay.

On July 25, 2015, defendant attended the baptism party at his mother’s apartment complex. Olivia and Bridgett were there. At around 10:00 or 11:00 p.m., they went to the casino. After the casino, Olivia drove them to Fernanda’s house. Olivia left sometime before 7:00 a.m. because she had to watch her child.

Around 7:00 or 8:00 that morning, defendant’s girlfriend Chela texted him to see if he was okay. Another friend, Anthony, also texted, asking if he was okay. Anthony eventually called and told defendant about the murders at the Pierce Street apartments. Defendant called Martin who also told him about the shootings.

A few days after the murders, defendant received a call from Juan telling him he had just been released from jail, and that police had shown him a photograph of defendant. He told defendant that the police were looking for him. Defendant was surprised to hear from Juan because they had had a falling out.

Juan had stolen a tablet from defendant's friend, and defendant had punched him.

Defendant shaved his head on the day of the arrest because he had a "meeting" that day. He usually wore his hair in an afro.

The bike found at his mother's apartment was not his, and he never rode it.

On the day of his arrest, defendant was interviewed by Detective Armijo. He told the detective to talk to Olivia because he was with her "most of the time through that night." He also told the detective to talk to Fernanda and Martin, and he said Martin was at the apartment complex before the shooting occurred.

During their interview, Detective Armijo lied to defendant and told him his DNA had been recovered from bullets found at the crime scene, and that six people had identified him as the shooter. Defendant told Detective Armijo he had given some bullets to Martin two months before the shooting. He found the bullets when he was cleaning a garage for some "old lady." He did not keep them because he did not own a gun.

Defendant also gave Detective Armijo a different account of his activities on the day of the shooting than what he and Olivia agreed upon in the recorded jail call, and different than what he testified to at trial. The day before the shooting, defendant and his girlfriend checked out of their motel, and then walked to the Pierce Street apartments to meet Martin. They drank Kool-Aid together at the apartment, and then went to his mother's apartment. He later dropped his girlfriend off, and had Fernanda pick him up. He spent the night at Fernanda's house.

To explain the discrepancies in his accounts, defendant testified that he was coming down off methamphetamine when he

spoke to Detective Armijo. Regarding the recorded phone call with Olivia, defendant agreed with Olivia's account of what occurred on the morning of the shooting because he was confused about when the shooting occurred.

Defendant testified he did not commit the shootings at the Pierce Street apartments.

Mitchell Eisen testified as an expert in the field of memory and eyewitness identification, and testified about the accuracy of eyewitness identifications, and what could influence those identifications.

Rebuttal Evidence

Detective Armijo testified that he located and interviewed Bridgett, Martin, Michael, and Fernanda. He had received certified records from the San Bernardino sheriff's office that Michael was in custody between July 16 and July 28, 2015, making Olivia's initial account to him false. Fernanda could not remember the specific dates or times she was with defendant.

DISCUSSION

1. Prosecutorial Misconduct During Closing Argument

Defendant complains of a number of instances of what he describes as prosecutorial misconduct during closing argument. "It is settled that a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.] . . ." [Citation.] "A prosecutor may "vigorously argue his case and is not limited to 'Chesterfieldian politeness' " [citation], and he may "use appropriate epithets warranted by the evidence." ' " (*People v. Wharton* (1991) 53 Cal.3d 522, 567.)

“Although defendant singles out words and phrases, or at most a few sentences, to demonstrate misconduct, we must view the statements in the context of the argument as a whole.” (*People v. Dennis* (1998) 17 Cal.4th 468, 522.) “‘Additionally, when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.’” (*People v. Ochoa* (1998) 19 Cal.4th 353, 427.)

a. Facts not in evidence

During the prosecutor’s closing argument, the district attorney made the following comment, without objection: “Let’s go to that community right there at Pierce and Glenoaks . . . the Pierce Apartments. I think it’s clear to you that there [are] probably other witnesses, other people that had relevant information as to what happened that morning. What they saw may be right before or right after, but this is a community that is hesitant to speak to the police. Maybe part of it is fear of retaliation. These people live here. They have nowhere to go.”

Defense counsel argued there was no evidence that anyone was scared to testify. Nevertheless, counsel advanced a theory that Martha and Juan “conspired to come up with somebody else because it would be dangerous for him to name the real shooter” and that there was an incentive for Juan to name defendant as the shooter because of the bad blood between them. She also argued that police did not thoroughly investigate the case after Martha named defendant as the shooter. Counsel argued that the police never interviewed Leonardo, despite evidence that he was the shooter. Counsel argued that Fernanda could not remember the dates she saw defendant so she was “useless.”

Counsel argued that police did not interview defendant's alibi witnesses who could prove that defendant was telling the truth about his innocence, notwithstanding Detective Armijo's testimony to the contrary.

During rebuttal, the prosecutor made the following comments: "Now let's talk about failure to call witnesses, logical witnesses. And again, this is something you can consider in your deliberations. He keeps saying he was at Fernanda's place. Fernanda, where is she? Why didn't they subpoena her? Maybe she didn't want to come to court to lie to be subject to perjury." Defense counsel interposed the following objection, "Objection, Your Honor. Improper." The court overruled the objection on the basis that the failure to call a logical witness may be commented upon.

The prosecutor went on to argue that "Detective Armijo found [Martin]. Did they subpoena him to come testify? I am not going to subpoena people who I know are going to lie. The only reason I put up [Juan] was that's kind of an exception, right? I had a pretty good feeling he was going to lie up there, but I impeached him with Martha . . . , right? I am not going to present false evidence before you. They failed to call [Martin]. It's funny, huh? Once you go down, you know what happens to all of your friends, the ones that you were actually with, right? If you were with them, they would have been here. Otherwise, they don't want to lie for you. Where are they?"

Defendant did not object.

Defendant contends for the first time on appeal these arguments improperly referred to matters not in evidence. As an initial matter, defendant has not preserved this issue on appeal, as no objection on this specific basis was interposed, and because

counsel did not seek an admonition to the jury. (*People v. Brown* (2003) 31 Cal.4th 518, 553; see also *People v. Stanley* (2006) 39 Cal.4th 913, 952.) Predictably, defendant contends that any objection would have been futile, or that the failure to object constitutes ineffective assistance of counsel. We therefore address the merits, find no misconduct occurred, and conclude there is no possibility of prejudice.

“While counsel is accorded ‘great latitude at argument to urge whatever conclusions counsel believes can properly be drawn from the evidence [citation],’ counsel may not assume or state facts not in evidence [citation] or mischaracterize the evidence.” (*People v. Valdez* (2004) 32 Cal.4th 73, 133.) Nevertheless, comment on the failure to call a logical witness is proper, because it simply invites the jury to draw a reasonable inference from the state of the evidence. (*People v. Ford* (1988) 45 Cal.3d 431, 449; *People v. Szeto* (1981) 29 Cal.3d 20, 34; *People v. Vargas* (1973) 9 Cal.3d 470, 475.)

First, the prosecutor’s comments that witnesses of the crime may have been scared to come forward because of fear of retaliation was firmly grounded in the evidence. Detective Armijo testified that members of the community were uncooperative and hesitant to come forward. Martha testified that she was scared for Juan’s safety if he came forward about the shooting. Therefore, this was a permissible commentary on the state of the evidence.

Regarding the failure to call Fernanda and Martin as witnesses, the prosecutor permissibly argued that logical witnesses who could have corroborated defendant’s version of the facts had not been called, supporting an inference that their testimony would not be favorable to defendant. Moreover, the

prosecutor was fairly responding to defendant's arguments during closing that the prosecution failed to fully investigate defendant's alibi witnesses.

We do not find defendant's comparisons to *People v. Gaines* (1997) 54 Cal.App.4th 821, 822 and *People v. Hall* (2000) 82 Cal.App.4th 813, 817 persuasive. In those cases, the prosecutor's comments crossed the line from permissible comments on the failure to call a logical witness into commentary on what testimony those witnesses would have given. Here, the prosecutor did no such thing.

Moreover, defendant cannot possibly demonstrate prejudice, as the comments were brief and unlikely to influence the jury, and the evidence against defendant was overwhelming.

The jury was instructed that attorneys' comments are not evidence, and that neither side is required to call all available witnesses who may have information about the case. Moreover, following defense counsel's closing argument, the prosecutor repeatedly reminded the jury that statements by the attorneys are not evidence. We presume the jury followed these instructions absent evidence to the contrary. (*People v. Nguyen* (1995) 40 Cal.App.4th 28, 37.)

The evidence against defendant was overwhelming. He was identified as the shooter by an eyewitness, who had seen defendant before, identified him from a photo lineup, identified him in court, and identified the bicycle defendant was riding. Defendant's alibi evidence was fraught with inconsistencies, and there was compelling evidence that the alibi was manufactured.

b. Denigrating defense counsel

During defense counsel's closing argument, she implied that Martha had received concessions from the district attorney

for her cooperation in this case, and that she was trying to use her testimony to get a “free ticket.” Defense counsel also became very emotional towards the end of her closing argument.

During his rebuttal, the prosecutor made the following remarks: “I appreciate that [defense counsel] is a strong advocate for her client.” Defense counsel objected that the remark was “improper” and “voir dire.” The objection was overruled. Counsel went on to argue “I appreciate that she can get emotional at the end of her argument. That doesn’t make her side any more true or whatever she says true because she gets emotional. The jury instructions say . . . [w]hat the attorneys say is not evidence, and you’re probably thinking to yourself, why are these people talking so much then? You know, it’s to help you to assist you, the trier of fact. She’s drank too much of her client’s Kool-Aid, for her to get up here and make it seem as though she knows something that you don’t know. She got up and basically told you threw everything on the walls and is trying to see what stucked [*sic*]. It’s fair. She has to hold . . . the people to their standard of proof beyond a reasonable doubt. She is saying there is a reasonable doubt. I’m saying it is imaginary doubt.

[¶] . . . [¶]

“She’s saying you can’t believe Martha . . . and [Juan], but you should believe them on some things. I mean, all of that is fine and dandy. Argue about the credibility of witnesses. That’s your choice. But you know what almost made me sick literally was when she tried to use a 14-year-old boy – [N.R.’s] testimony to set a guilty killer of his uncle free by arguing that that’s a reasonable doubt. She says what [N.R.] says is that [Leonardo] admitted to him that he killed his uncle. Well, first of all, I don’t doubt that [N.R.] is lying about what [Leonardo] told him.

[Leonardo] said, 'I sent your uncle to heaven,' right? Now she wants to say that that means he confessed and that he's the murderer. What we know, he was in the parking lot. I don't know what he saw. He wasn't straightforward. He wasn't forthcoming, but he didn't say, 'I killed your uncle.' And you know what, she keeps leaving out he also said, 'I want to be with your mom.' I mean, what kind of man talks to a . . . 14-year-old kid like that?' This guy is sick. But that's another issue.

"What does the evidence show? You know I am not getting up here and saying, 'If you are a gang member, don't believe this person,' or 'if you are a drug addict, don't believe this person.' Every person you heard them testify, you judge for yourself whether they were telling the truth or not. But this statement, to set the killer of his uncle free – that's disgusting a little bit. You can't have it both ways. You can't argue everything both ways. And that's what . . . the defense attorney did in this case."

Discussing Martha's testimony, the prosecutor argued: "Martha has felony convictions. She's a thief, a meth user, but she has guts. She came to court at the preliminary hearing. She testified. She testified at the trial. But also another thing, the defense tries to say that she did it for a reason every time. . . . There were no promises, no consideration given to her by the district attorney's office. And again, if there were, you would have heard about it, just as you were given the information about the informant the LAPD used, because that's the obligation of the prosecution team, is to give them everything. That's the only reason you got that information too, because there's no secrets. There's no, you know, secrets here. If she was given anything, you would have heard about it. And for [defense counsel] to

imply that she -- she's only testified for consideration, it's just -- it's insincere.”

No objections were made.

Defendant contends for the first time on appeal that the prosecutor denigrated defense counsel by saying that she drank too much of her client's Kool-Aid, that calling N.R. as a defense witness made him “sick” and that the testimony was “disgusting,” and that it was “insincere” for defense counsel to imply that Martha received any consideration for her testimony. However, counsel never objected on this basis to any of these comments. Therefore, any claim of error has been forfeited.

In any event, the claim fails on its merits. “ ‘A prosecutor commits misconduct if he or she attacks the integrity of defense counsel, or casts aspersions on defense counsel.’ ” (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1336-1337.) Nevertheless, a prosecutor is given wide latitude during closing argument. A prosecutor need not be polite, and may resort to colorful language. (*People v. Hill* (1998) 17 Cal.4th 800, 819-820.) Characterizing defense arguments as “ ‘ludicrous,’ ‘ridiculous,’ ‘preposterous,’ ‘outrageous,’ ‘offensive,’ ‘shock[ing]’ or ‘bull’ ” is not misconduct. (*People v. Peoples* (2016) 62 Cal.4th 718, 793.)

We find no misconduct here. The remark about “Kool-Aid” is a common phrase that grew out of the 1978 Jonestown deaths of hundreds of people who were persuaded to drink cyanide-laced Kool-Aid. The phrase is often used to refer to one who believes a preposterous notion, and the prosecutor may also have been referring to defendant's statements to Detective Armijo about drinking Kool-Aid with Martin the day before the killings. In any event, it was a fair commentary on the implausibility of defendant's alibi evidence. The comments regarding N.R.'s

testimony were not a personal attack on defense counsel, but a permissible criticism of the defense's tactical choice to call him as a witness. Moreover, the comment that defense counsel was "insincere" was a proper commentary on the state of the evidence since nothing suggested Martha had received any consideration for her testimony.

And, for the reasons discussed *ante*, there is no possibility of prejudice. For this same reason, we do not find any cumulative error.

2. Firearm Enhancements

The jury found true firearm allegations under section 12022.53, subdivisions (b), (c), and (d). The court imposed two 25-year-to-life enhancements under subdivision (d). Defendant seeks remand for resentencing in light of Senate Bill No. 620, effective January 1, 2018, which amended section 12022.53, subdivision (h) to give the trial court discretion whether to strike previously mandatory firearm enhancements. (§ 12022.53, subd. (h) ["The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law."].)

The discretion to strike a firearm enhancement may be exercised as to any defendant whose conviction is not final as of the effective date of the amendment. (See *In re Estrada* (1965) 63 Cal.2d 740, 742-748; see also *People v. Brown* (2012) 54 Cal.4th 314, 323.) Because defendant's conviction was not final when Senate Bill No. 620 went into effect, respondent agrees that remand is proper, as do we. (See *People v. Vieira*

(2005) 35 Cal.4th 264, 305; see also *Bell v. Maryland* (1964) 378 U.S. 226, 230.)

On remand, the court may exercise its discretion under section 12022.53, subdivision (h), to strike all of the firearm enhancements under that provision or impose any one of the enhancements. If the court chooses to impose a firearm enhancement, it must strike any enhancements providing a longer term of imprisonment, and impose and stay any enhancements providing a lesser term. (§ 12022.53, subds. (f) & (h).) For example, the court may choose to impose the 25-year-to-life enhancement under section 12022.53, subdivision (d). If so, it should impose and stay the enhancements under section 12022.53, subdivisions (b) and (c). If the court imposes the 20-year enhancement under section 12022.53, subdivision (c), it must then strike the 25-year-to-life enhancement under section 12022.53, subdivision (d), and impose and stay the 10-year enhancement under subdivision (b). Moreover, any enhancement imposed under section 12022.53 must be imposed consecutively rather than concurrently.

In addition, the trial court has discretion to strike only the punishment for the enhancement. (§ 1385, subd. (a); *In re Pacheco* (2007) 155 Cal.App.4th 1439, 1443-1446.) “In determining whether to strike the entire enhancement or only the punishment for the enhancement, the court may consider the effect that striking the enhancement would have on the status of the crime as a strike, the accurate reflection of the defendant's criminal conduct on his . . . record, the effect it may have on the award of custody credits, and any other relevant consideration.” (Cal. Rules of Court, rule 4.428(b).)

3. Prior Conviction Enhancement

Defendant received one 5-year prior conviction enhancement under section 667, subdivision (a)(1). Defendant contends that under Senate Bill No. 1393, we must remand for the trial court to consider and exercise its newly enacted discretion to strike the enhancement. Respondent concedes this point, and we agree.

At the time of defendant's sentencing, the trial court lacked the authority to strike enhancements proven under section 667, subdivision (a)(1). (*People v. Valencia* (1989) 207 Cal.App.3d 1042, 1045–1047.) But Senate Bill No. 1393, which became effective January 1, 2019, removed the prohibition on striking the enhancement by deleting the provision of the former version of section 1385, subdivision (b), which stated: "This section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667." (Sen. Bill No. 1393 (2017-2018 Reg. Sess.) ch. 1013, § 2; see § 1385.)

Because Senate Bill No. 1393 has taken effect and defendant's judgment is not yet final, the new law applies to him retroactively. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 973 [holding Sen. Bill No. 1393 will apply retroactively upon effective date]; see *In re Estrada, supra*, 63 Cal.2d at pp. 746–748.)

4. Multiple-Murder Special Circumstances

Defendant contends the court erred by imposing two life without the possibility of parole sentences based on the jury's multiple-murder special circumstance finding. Here, the jury was asked to decide a single multiple-murder special circumstance. The court applied that finding to each count. Respondent concedes that this was error, and we agree. (*People*

v. Nunez (2013) 57 Cal.4th 1, 49 [error to allow jury to make multiple-murder special circumstances findings as to each count of murder].) Accordingly, remand is necessary for the trial court to impose a life without the possibility of parole sentence as to only one count, and to sentence defendant on the remaining count for first degree murder with any applicable alternative sentencing enhancements.

DISPOSITION

We remand the matter for resentencing to allow the trial court to exercise its discretion regarding defendant's prior recidivist enhancement and the firearm enhancements, and to resentence defendant in light of our finding on the multiple-murder special circumstance. Following resentencing, the court shall issue an amended abstract of judgment and shall forward the same to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

WILEY, J.